Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 22, 1994

Mr. Burton F. Raiford
Commissioner
The Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR94-472

Dear Mr. Raiford:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 26075.

The Texas Department of Human Services (the "department") received an open records request for records pertaining to the department's investigation into an allegation of sexual favoritism. A review of the records at issue reveals that no sexual favoritism ever took place. You inquire whether the names of witnesses interviewed and their responses to the interviewer's questions come under the protection of common-law privacy as established under *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied).

Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information protected by the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is 1) highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person, *and* 2) of no legitimate concern to the public. *Id.* at 683-85. None of the interviewed witnesses testified to having witnessed sexual harassment or favoritism. Thus, the records at issue here contain no "highly intimate or embarrassing" information, and releasing these

records does not implicate the privacy interests of the witnesses. The department must release the names and statements of the witnesses.[1]

The only information contained in the records at issue that conceivably meets the first part of the test for common-law privacy is the original allegation itself. However, because the allegation was made anonymously, we need not consider the privacy interests of the author of the allegation. On the other hand, we do need to consider the privacy interests of the accused employees and whether there is a public interest in the unfounded allegation that one of the department's employees received a promotion as a result of favoritism. We believe that a previous open records letter addressed to the department governs this aspect of your request. In Open Records Letter No. 93-668 (1993) at 5, this office concluded as follows:

> This office would distinguish the records at issue here from those in *Ellen*. . . . [A]fter reviewing the records this office found no evidence of harassment in the nature of quid pro quo or of the deliberate creation of a hostile working environment resulting from other forms of sexual harassment, but rather only allegations of sexual favoritism where certain employees allegedly received special treatment because of their personal relationships with their superiors. While this office believes that information pertaining to personal relationships within the workplace generally would be protected from public disclosure under common-law privacy, we do not believe that the fact that a public employee has received preferential treatment in the workplace as a result of a personal relationship with a superior is outside the realm of the public interest. Accordingly, the department must release the information pertaining to these allegations.

Although the investigation did not uncover any favoritism, this type of allegation is not the type of information that implicates the common-law privacy interests of the accused employees.[2] The department therefore must release the requested information in its entirety.

---

[1]We do not address the question of whether common-law privacy would protect the names and statements of witnesses when some witnesses report sexual harassment and others do not. The facts of the situation here do not raise this question.

[2]Although you do not specifically argue that the unfounded allegations implicate the employee's "false-light" privacy interests, we note that the Texas Supreme Court has recently held that the state of Texas does not recognize the tort of false-light invasion of privacy. *See Cain v. Hearst Corp.*, 1994 WL 278365 (Tex., June 22, 1994) (No. D-4171). Consequently, the department may not withhold the allegations from the public pursuant to common-law privacy merely because they may be untrue.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,

Margaret A. Roll

Margaret A. Roll
Assistant Attorney General
Open Government Section

MAR/RWP/rho

Ref.: ID# 26075

Enclosures: Submitted documents

cc: Mr. Gilbert C. Perales
Program Manager
Client Self Support Services
Texas Department of Human Resources
P.O. Box 23990
San Antonio, Texas 78223-0990
(w/o enclosures)